Supreme Court, U.S.
FILED
NOV 20 2006
OFFICE OF THE CLERK

(3)

No. 06-438

IN THE

Supreme Court of the United States

SHELBY S., a minor by and through her Conservator and next friend, KATHLEEN T.,

Petitioners,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, Louisiana 70053
(504) 251-4359

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, Texas 78664
(512) 244-6658

Attorneys for Petitioners

204927

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
A. COMMENT ON "QUESTION PRESENTED"	2
B. THE RESPONSE BY THE SCHOOL DISTRICT IS FLAWED	3
1. Respondent's Substantive Arguments Are Without Merit	5
2. A Brief Comment On The Facts	7
C. THE SCHOOL DISTRICT'S WAIVER ARGUMENT IS WITHOUT MERIT	8
D. RESPONDENT HAS WAIVED ANY CLAIM REGARDING THE CAPACITY ISSUE	9
SUMMARY AND CONCLUSION	10

TABLE OF CITED AUTHORITIES

A. FEDERAL CASE LAW

Page

Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176 (5th Cir. 1995) 3, 4

Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 179 (1982) 7

Blau v. Fort Thomas Public School Dist., 401 F.3d 381 (6th Cir. 2005) 6

Boone v. Boozeman, 217 F. Supp. 2d 938 (E.D. Ark. 2002) 6, 7

Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) 7

Dubois v. Conn. State Bd. Of Ed., 727 F.2d 44 (2nd Cir. 1984) 6

Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) 6

Johnson V. Duneland Sch. Corp., 92 F.3d 554 (7th Cir.1996) 6

Mozert v. Hawkins County Bd. Of Educ., 827 F.2d 1058 (6th Cir. 1987) 6

M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153 (11th Cir. 2006) 6

Murphy v. State of Arkansas, 852 F.2d 1039 (8th Cir. 1988) 6

Cited Authorities

Page

Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist., 454 F.3d 450 (5th Cir 2006) 4

Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) 5

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 5

United States v. Glover, 242 F.3d 333 (6th Cir. 2001) ... 9

B. FEDERAL STATUTES

20 U.S.C. §1400 *et seq.* 1

INTRODUCTION

The Court should grant Petitioner's request for all the reasons noted in their original writ, most importantly that the issue addressed therein is one of constitutional proportion. Its proper consideration and adjudication affects the rights of all children with disabilities, and by extension their parents, throughout the United States. It is certainly an issue of important public policy that warrants due consideration.

Respondent's Brief in Opposition did not offer any significant or reasonable grounds of challenge to Petitioner's position and request. For instance, while Respondent has provided a number of reasons as to why Petitioner's request for *certiorari* should be denied, much of it is procedural and little of it substantive. In fact, to the extent Respondent has provided some substantive discussion arguing against consideration of Petitioner's writ, they fail to actually answer or adequately address the specific question that has been actually posed by Petitioner; i.e., when a school wishes to complete their own medical evaluation of a child, and the family chooses not give consent to the requested evaluation, may the school over-ride this parental decision by merely articulating reasonable grounds, or must the school demonstrate a more compelling interest to overcome the fundamental rights involved?

Respondent attempts to unfairly recharacterize Petitioner's position. They argue that all Petitioner really desires is the unilateral ability to dictate the educational placement and services of Shelby. That is incorrect. Shelby simply requests that this Honorable Court require the school district to give due weight to her constitutionally protected privacy rights and liberty interests including her right to bodily integrity.

Petitioner is not requesting unilateral authority but simply an equal say in the partnership contemplated by IDEA, 20 U.S.C. §1400 *et seq*. She desires that her rights, and the rights of other persons similarly situated, the constitutionally protected fundamental rights of privacy and by extension that of consent, be given full life and breath by this Court. This can only be done with a complete briefing on the issue.

Without such consideration and briefing, these fundamental rights, for persons who are the most disabled in our culture, and most in the need of our communal protection, become an empty promise. Certainly when children with special needs are mainstreamed into the regular education environment and learn about our shared great American values, and the absolutely unequaled protections noted in our Constitution, they must find that the Constitution values them and protects them as well. That can only occur if this Court gives them the opportunity to have their voice heard, their argument given due consideration, by and through the granting of this writ

ARGUMENT

A. COMMENT ON "QUESTION PRESENTED"

Respondent first attempts to re-characterize Petitioner's argument, and in doing so, redirect the Court away from the issue as originally presented. This re-characterization should be rejected. In their original writ, Petitioner posed the following query:

> "Is the correct standard of review a school district must meet to override parental consent and compel a child to undergo a medical examination that is potentially life-threatening, merely reasonable as the 5th Circuit has articulated, or must it be of a compelling interest, and provided in the least restrictive means, consistent with well-settled Supreme Court jurisprudence when construing issues relative to fundamental familial rights?"

Respondent responded with the following "Question Presented":

> "May a parent deny a school district the opportunity to evaluate the special education and related services a child needs under the Individuals With Disabilities Education Act and force it instead to provide the educational program the parent unilaterally determines to be appropriate?"

Let the Petitioner be unequivocally clear, it is not their belief, nor ever has it been their belief, that they have the ability to unilaterally determine Shelby's needs or educational

placement, nor has Petitioner attempted to determine any aspect of the educational program provided by the school. Petitioner seeks instead to ensure that Shelby's medical expert controls the medical regimen provided to the child at school. All along the procedural path of this case, Petitioner has argued that her voice, at the very (very) least, be given an opportunity to be realistically heard during the administrative process, so that the school's request for a medical evaluation not be a foregone conclusion, as (previously) required by *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), and as was very obviously the case when first heard by the Texas Special Education Hearing Officer.

Further, Petitioner has continually argued that if and when a school requests to complete a medical evaluation, especially one where there was evidence the evaluation could be dangerous to a child, copious detailed medical information was on file already, then at the very least, the requestor should be required to satisfy well-settled constitutional requirements, i.e, be of a compelling nature and be administered with the least restrictive manner. In all fairness, and up to this point, the only entity with the ultimate legal authority to do anything unilateral was the school district. IDEA contemplates an equal partnership between a parent and a school, not a unilateral power to either. The Court should grant this writ so that the issue as posed by Petitioner be given the full hearing that it rightfully deserves and reject Respndent's recharacterization of the issue.

B. THE RESPONSE BY THE SCHOOL DISTRICT IS FLAWED

The long-held belief by Hearing Officers in Texas, the Fifth Circuit and in various state educational agencies throughout the United States (though not all) was that a Hearing Officer had absolutely no discretion, none at all, but to grant a school's request to evaluate a child, if a parent did not provide the necessary consent to do so. *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995). A review of the legal terrain since 1995 would note that an increasing number of Hearing Officers and State Educational Agencies have rejected, at least in part, the "no discretion" standard set forth in *Andress*. These

Hearing Officers and State Educational Agencies have deemed it crucial to the decision-making process to consider, for instance, whether the evaluation was medical in nature or one that was purely academic or educational; or whether or not the evaluation requested was actually necessary based upon the information already available to the parties and most importantly, if the evaluation requested could be harmful to the child.

At the District Court and later at the Fifth Circuit, Petitioner argued first, that a Hearing Officer should have discretion to determine, based upon the facts, and for instance, those considerations noted above, whether or not the evaluation requested was actually warranted. Petitioner also argued that any decision to over-ride a parent's consent must consider her fundamental constitutional rights relative to familial privacy and integrity, and by logical extension, the ability of her next friend to effectuate such rights.

In their decision, the Fifth Circuit panel never specifically mentioned *Andress*, but did clarify that the "no discretion" standard was not exactly correct. They stated that "where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so." *Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir 2006). Without specifically saying so, the Fifth Circuit obviously agreed with Petitioner that the "no discretion" standard was suspect, and that a Hearing Officers does in fact have not only have the discretion to make a decision, but the duty to assure, based upon language in the decision, that at the very least the request was reasonable.

The Panel also considered, but nevertheless rejected, Shelby's claim that ordering a medical evaluation without consent violated her right to privacy. The Court also found that the requested evaluation and procedures, without further discussion, were not "constitutionally problematic." *Id.* Shelby, by and through her next friend, disagreed. She now asks that this Supreme Court issue a writ and consider whether or not the requested evaluation was fact, constitutionally

problematic and whether the "reasonableness" standard espoused therein, was infirm.

Shelby believes this "reasonableness standard," while certainly more cognizant of her rights than the previous "no discretion" standard, nevertheless is still constitutionally problematic. Specifically, every other child, in every other context where a medical evaluation is contemplated, has a significant right of privacy and of bodily integrity.

Respondent alleges that Petitioner believes her rights are absolute, and that she has unilateral authority to rely upon outside evaluations, and set her own educational course. That is not correct. Petitioner is not concerned with educational issues; Petitioner is concerned with medical issues. Shelby's eligibility is not at issue, nor are any educational issues dealing with Shelby's program at school. Petitioner recognizes that her right to make medical decisions for Shelby is tempered by and subject to the state's interest. She merely believes that the state's interest should be compelling. Why should Shelby's rights, and of those children similarly situated, be lost when they reach the steps of the schoolhouse. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). While Respondent's brief answers many questions, it does not answer this one.

1. Respondent's Substantive Arguments Are Without Merit

Respondent cites *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) for the proposition that "parents simply do not have the right to control each and every aspect of their children's education and oust the state's authority over that subject." Petitioner agrees with this general theory but once again, urges that an intrusive medical evaluation, one that could be harmful to the child, is not of the same character or consideration noted in the *Swanson* case [when a school wants to evaluate a child being home-schooled due to parent's religious concerns, the first amendments *free-exercise clause* is not triggered, so that no compelling state interest is required].

The other cases cited by Respondent in support of their proposition that the medical evaluation in question does not infringe upon Shelby's or Ms. T.'s constitutional rights,

likewise do not specifically address Petitioner's question about medical evaluations,[1] especially when the proposed examination could be harmful to the child. Respondent asks this Court to look to *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381 (6th Cir. 2005) in support of the proposition that Petitioner has no justiciable rights in the medical context noted, but *Blau's* silence on particular issues actually supports Petitioner's position

Blau correctly noted that in regard to a school dress code, as well "in the curriculum, the hours of the school day, the timing and context of examinations, the individuals hired to teach at the school, the extra-curricula activities offered at the school," there are no fundamental rights triggered. Nevertheless, that Court did not address, nor were they asked, whether such rights do exist in regard to a medical evaluation. In *Boone v. Boozeman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), also cited by Respondent, there are certain medical issues discussed, but unlike *Blau, Boone* actually supports Petitioner's position for what it does say.

In *Boone*, the Court noted that a school has the right to immunize a child over the objection of a parent, even when based upon the establishment clause of the First Amendment, because the school has a (compelling) duty and interest in protecting other children against the spreading of disease. The Court wisely noted that their decision could be different if the vaccine was "specifically medically contra-indicated" for the child. *Id.* at 956, fn. #41. In such an instance, the child's fundamental rights would find protection under a blanket

---

1. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006) [parent wanted reimbursement for certain services but would not permit school to perform a statutorily mandated re-evaluation, school had absolutely no information to make a decision upon]; *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554 (7th 1996) [child's treating physician was in favor of the evaluation but the parents's still refused]; *Dubois v. Conn. State Bd. Of Ed.*, 727 F.2d 44 (2nd Cir. 1984) [parent wanted reimbursement from school for certain services but refused to permit evaluation]; *Murphy v. State of Arkansas*, 852 F.2d 1039 (8th Cir. 1988) [no fundamental rights triggered in home-school situation]; *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) and *Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058 (6th Cir. 1987), cert denied, 484 U.S. 1066 [no fundamental rights based upon "free exercise" clause of First Amendment in reading program].

woven with the clothe of a liberty interest. The reasoning in *Boone* and its relevance to the instant case is telling. First, the effect of the provision or failure to provide a medical evaluation on Shelby would have no effect upon other students, unlike the vaccination issue. Second, and even more importantly, there is significant evidence that the evaluation contemplated by the Respondent school district is in fact, "specifically medically contra-indicated" for Shelby. As such, not only should her fundamental rights be given full respect, but the state should be required to show a compelling reason to overcome such medical contra-indication. Further, the projected outcome of the evaluation, a medical regime or prescription for Shelby's healthcare at school devised by the school's doctor to replace the prescription provided by Shelby's own doctor produces a result that should shock the conscience, i.e. overturning the right to determine what is to be done or not done with one's own body that is at the base of human liberties.

2. A Brief Comment On The Facts

Petitioner first notes that Respondent does not apparently disagree with her assertion that the evaluation requested was purely medical in nature.[2] As previously discussed herein, medical evaluations pursuant to IDEA take on a different character and legal analysis, than those solely related to education concerns.

Respondent comments that the "material facts are not in dispute (Resp. at p. 2)." Petitioner agrees and wishes it had been left "as is." Nevertheless Respondent goes on to describe certain "misstatements of fact (Resp. at p. 5)," giving rise to certain inappropriate "implications" or "assertions." Petitioner does not believe that she has provided any facts that have any untoward or inappropriate "implications" or

---

2. In IDEA, the term "medical services" refers only to services that must be performed by a physician, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999). When Respondent recognized that only Clarke, a physician, could perform the evaluation, then the normal legal analysis used when construing an educational issue, *see, Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 179 (1982), gave way and a different analysis should have been used, as different rights and remedies were involved.

"assertions," as Respondent professes. This case simply involves an issue where reasonable minds may reasonably differ. There is no attempt or desire to mislead, but rather a desire to have a full and fair adjudication of this important issue.

In addition, Respondent comments that Petitioner has argued or intimated the Hearing Officer was biased at to her. Petitioner has never argued (nor could she) that the decision made by the Hearing Officer was based upon bias, personal animus, unethical or some other inappropriate human factor. Rather, Petitioner has argued at every step along the way that the various comments made by the Hearing Officer during the due process hearing provide evidence, not of bias, but the belief held by Hearing Officer that he had no discretion to make a decision, other than to grant the school's request to perform their own medical evaluation of the child. The inability to have any discretion was one of the material issues at the appellate stage.

Respondent further comments that Petitioner has attempted to present evidence establishing that the District's expert, Dr. Gary Clark, M.D. could not safely evaluate Shelby. In the presentation of her factual resume, Petitioner wanted the Court to be aware that her physician, Dr. Dorothy Kelly, M.D., believed otherwise. As the case at the District Court was dismissed at the summary judgement stage, Petitioner believes it is important that this contested issue of material fact be brought forward again, and at this time, particularly in light of the fact Respondent does not disagree with Petitioner's assertion that the evaluation requested by the school could have harmful results upon Shelby.

Petitioner asks this Court to note that the Hearing Officer never made a determination or finding of fact, or any commentary at all, on whether or not Clark could perform the evaluation safely.

C. THE SCHOOL DISTRICT'S WAIVER ARGUMENT IS WITHOUT MERIT

First and foremost, Respondent's argument should be rejected because it totally misconstrues the nature of Shelby's argument. The issue as posed by the real party in interest,

Petitioner Shelby S., is whether or not the school has demonstrated a sufficiently compelling interest to perform a medical evaluation against her will; a position that can only be given a legal voice and constitutional protection, through her next friend. The rights we are speaking about only exist in the context of the parent-child relationship, they are not and cannot be devoid of each other. Respondent's argument that Petitioner's writ has somehow only brought forward claims that solely speak to the individual rights of Kathleen T., and not of the actual right of Shelby S., is quite frankly, misguided. In short, Kathleen T.'s rights are derivative and only exist upon Shelby's right to be free from an unwarranted intrusion upon her bodily privacy. In any case, Respondent was clearly on notice as to any and all of these issues. *United States v. Glover*, 242 F.3d. 333, 336 (6th Cir. 2001).

D. RESPONDENT HAS WAIVED ANY CLAIM REGARDING THE CAPACITY ISSUE

In any case, Respondent has waived the very claim they argue about. At the District Court stage, Shelby argued that she, by and through her grandmother Kathleen T., and solely as next friend, had a constitutionally protected, and fundamental right, regarding this consent issue. At that stage, Respondent made absolutely no comment distinguishing as to whether this contended right was brought by Shelby through her parent's capacity as next friend, or alternatively, whether or not her parent was bringing the claim in any individual capacity.

At the Fifth Circuit stage, Shelby again argued that she, by and through her parent Kathleen T., and as next friend, had a constitutionally protected, and fundamental right, regarding this privacy issue. At that stage, Respondent again made absolutely no argument or comment distinguishing as to whether this contended right was brought by Shelby through her parent's capacity as next friend, or alternatively, whether or not her parent was bringing the claim in any individual capacity.

In her Fifth Circuit brief, when mentioning who the real parties in interest are, it specifically states that Shelby S. is one party and that Kathleen T. is a party only as "Next Friend Of

Appellant." There is no mention of any claims in Kathleen T.'s individual capacity. When Petitioner made that constitutional argument in that brief, as she has made in this one, Respondent did not object. Respondent now argues that "it is apparent (emphasis added) that the Fifth Circuit found that Kathleen T. had not properly perfected an appeal in her individual capacity because it did not address her claims."

This is not a correct assessment of the Fifth Circuit's opinion. The Court specifically states, and in regard to the issue at hand, that it "was not constitutionally problematic." The Court very definitely did address the constitutional claim. Respondent is incorrect, that the language in the 5th Circuit's opinion, somehow, "apparently" supports their waiver argument. It does the opposite, it disproves it.

SUMMARY AND CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

MARTIN J. CIRKIEL
Counsel of Record
CIRKIEL & ASSOCIATES, P.C.
1901 East Palm Valley Boulevard
Round Rock, Texas 78664
(512) 244-6658

CAREN MORGAN CAMBRE
1300 Jefferson Street
Gretna, Louisiana 70053
(504) 251-4359

Counsel for Petitioners